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February 10, 2000

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

RE: Comments
MM Docket No. 00-10
MM Docket No. 99-292
RM-9260

Dear Ms. Salas:

Transmitted herewith on behalf of Television Capital Corporation, is an original and four (4) copies of its Comments in response to the Commission's *Order and Notice of Proposed Rulemaking* in the above-referenced proceeding..

Should any questions arise in connection with this matter, kindly communicate directly with the undersigned.

Respectfully submitted,

Howard J. Barr
Counsel

Enclosures

OLU

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 00-10
Establishment of a Class A	)	MM Docket No. 99-292
Television Service	)	RM-9260

To: The Commission

COMMENTS

Television Capital Corporation ("TCC"), by counsel, hereby submits its Comments in response to the Commission's above-captioned *Order and Notice of Proposed Rulemaking ("NPRM")*, FCC 00-16, released January 13, 2000. The following is shown in support thereof:

I. BACKGROUND

On September 20, 1996, TCC, through wholly owned subsidiaries, filed applications for new television stations for the following channels in the listed communities of license:

Television Capital Corporation of Richmond	Channel 63, Richmond, VA
Television Capital Corporation of Mobile	Channel 61, Mobile, AL
Television Capital Corporation of Portland	Channel 40, Portland, OR
Television Capital Corporation of Gainesville	Channel 61, Gainesville, FL
Television Capital Corporation of Lexington	Channel 62, Lexington, KY
Television Capital Corporation of Houma	Channel 11, Houma, LA

While each of its applications stands to be potentially affected by the outcome of this proceeding, its mutually exclusive applications for Mobile, Portland and Gainesville stand to be directly and immediately adversely affected.

The Commission initiated this proceeding in order to implement the Community Broadcasters Protection Act of 1999 ("CBPA").[1] The CBPA requires the Commission to grant certification of Class A eligibility in the absence of a material defect and "to preserve the service areas of low power television licensees pending the final resolution of a Class A application."[2] The Commission is to adopt implementing regulations by March 8, 2000. Under the CBPA, "a licensee may submit an application for Class A designation ... within 30 days after final regulations are adopted."[3]

While the CBPA provides for expedited consideration of Class A applications, it also provides that a Class A license or modification of license may not be granted where the station would cause interference within the predicted Grade B contour (as of November 29, 1999) of any television station transmitting in analog format ..."[4] The Commission seeks comment on how to interpret the phrase, "transmitting in analog format," proposing to limit the definition to "stations actually transmitting in analog format and those which have been authorized to construct facilities capable of transmitting in analog format." *NPRM* at ¶ 27.

Under this proposal, Class A stations will not be required to protect pending NTSC applications or allotment rulemaking petitions, or modified allotment proposals for channel or other technical changes, including modification applications filed after November 29, 1999, notwithstanding that some of these applications have been pending

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[1] Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), codified at 47 U.S.C. § 336(f).

[2] 47 U.S.C. § 336 (f)(1)(B) & (C).

[3] 47 U.S.C. § 336 (f)(1)(C).

[4] 47 U.S.C. § 336 (f)(7)(a).

for over ten (10) years. *Id.* Accordingly, TCC and numerous similarly situated applicants are entitled to protection from full service analog modification applications, but not from Class A applications.

II. THE COMMISSION MUST PROTECT PENDING NTSC APPLICATIONS

A. Fairness Dictates That Pending NTSC Proposals And Their Outgrowths Should Be Protected

In 1996, the Commission provided a final opportunity for the filing of new applications for analog TV stations for vacant allotments and rule making petitions to add channels to the TV Table of Allotments. *Sixth Further Notice of Proposed Rulemaking* ("*Sixth FNPRM*") 11 FCC Rcd 10968 , 10992 (1996).[5] In addition to accepting applications filed by the September 26, 1996 deadline, the Commission maintained its cut-off notice policy, thereby allowing additional competing applications to be filed beyond September 26, 1996. *Id.*

TCC, as did others, relied on the Commission's decision to accept and process their applications. They devoted scarce time, energy and money to the preparation and prosecution of their applications that could have been devoted to other ventures. Notwithstanding their good faith reliance on the Commission's decision to accept and process their applications, these applicants have been beset by setback after setback, none of their own making or doing.

First, the Commission concluded in *Reallocation of Television Channels 60-69, the 746-806 MHZ Band* ("*Reallocation Order*"), 12 FCC Rcd 22953, 22970-71 (1998), that it would no longer authorize additional new analog full service television stations on

Channels 60-69. TCC was directly and adversely affected by this decision given its proposed above Channel 60 operations in Mobile, Gainesville, Richmond and Lexington.

The Commission, however, continued to give TCC and others like it reason to hope. Rather than "summarily terminating" pending applications for stations on Channels 60-69, the Commission announced "it would provide applicants and petitioners an opportunity to amend their applications and petitions, if possible, to seek a channel below channel 60." *Id* at 22971.

With these marching orders, TCC and others proceeded to devote time, energy and money into exploring below Channel 60 alternatives. The Commission ultimately opened a window filing opportunity – though not until almost two years had passed -- permitting applicants with pending applications for new full service NTSC stations on Channels 60-69 to file petitions for rule making for allotment of a channel below 60. *Public Notice*, DA 99-2605, released November 22, 1999. The window opened on that date and closes on March 17, 2000. *Id.*

During the interval between the release of the *Reallocation Order* and the window notice, TCC actively negotiated with its mutually exclusive applicants to determine whether they could locate suitable channel alternatives and resolve the proceedings through settlement. TCC is prepared and intends to file settlement agreements in accordance with the *Public Notice* prior to the window's closing on March 17, 2000.

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[5] September 26, 1996, i.e., thirty days after publication of the *Sixth FNPRM* in the Federal Register was established as the filing deadline.

Hot on the window notice's heels, however, was Congress' enactment of the CBPA and the Commission's proposal to protect only authorized or permitted NTSC facilities. Thus, all of TCC's applications stand in jeopardy. For many, including TCC, the "opportunity" presented by the window notice is or may be a nullity because of the Commission's proposal not to protect their pending applications or the facilities sought in the reallocation window.

The Commission has repeatedly stated that it would seek to accommodate pending applications and rulemaking petitions for new NTSC stations.[6] After encouraging and then fostering applications such as TCC's, the Commission must act to protect their interests.

Any other action will work a manifest unfairness on applicants such as TCC who dutifully and in good faith expended time, energy and money in reliance on the Commission's announced policies. The Commission must balance the need to protect the existing investment made by applicants such as TCC in good faith reliance on the Commission's announced policies with its obligations under the CBPA. The Commission can do this by extending protection against conflicting LPTV Class A proposals to pending NTSC applications and proposals and facilities sought in the reallocation window.

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[6] *See, e.g., Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders,* FCC 99-257, ¶ 41 (1998).

B. The Commission Should Not Permit Its Primary Service Applicants To Be Leapfrogged

LPTV and translator stations have always received protection that is secondary to that afforded to full power stations and have always been subject to displacement at any time. This secondary status has led the Commission to proposed to give LPTV stations what amounts to preferential treatment over NTSC applications.

In July, 1987, when the Commission instituted a freeze on new analog TV allotments so as to "preserve sufficient broadcast spectrum to insure reasonable options relating to spectrum issues for ... new technologies," the Commission expressly excluded LPTV stations from the freeze because of their secondary status. *Freeze Order*, 52 Fed. Reg. 28346, ¶ 2 (1987). The Commission stated that: "this freeze will not apply to low power television (LPTV) and television translator applications ... These constitute a secondary service and pursuant to present rules are subject to displacement by a primary service. Therefore, LPTV and TV translator grants will not restrict Commission options." *Id* at ¶ 3.

Thus, LPTV and TV translator stations were licensed throughout the DTV freeze because of their secondary status. This secondary status now forms the basis upon which many "qualified LPTV stations" obtained their authorizations. Thus, while the applications and proposals of NTSC advocates languished, LPTV licensees were unfettered in their ability to commence and improve operations. Now, they have been bumped to the proverbial head of the line simply because they proposed a secondary rather than primary service. Fundamental fairness dictates that qualified LPTV stations should be required to protect pending NTSC applications and proposals and facilities sought in the reallocation window.

C. Pending NTSC Applications And Proposals Are Entitled To At Least The Same Standing As Pending LPTV And TV Translator Applications

The CPBA requires Class A applicants to protect LPTV and TV translator applications filed prior to the date on which a Class A application is filed.[7] Again, LPTV and TV translator stations have always been secondary services subject to displacement at any time. To require Class A applicants to protect pending applications for LPTV and TV translator stations while giving no protection to pending applications for full service stations is completely inconsistent with the Commission's longstanding regulatory framework. Again, it allows such applicants to be bumped to the proverbial head of the line simply because they proposed a secondary rather than primary service. Fundamental fairness dictates that pending applications for full service stations be given at least the same rights as pending LPTV and TV translator applications.

D. The Commission Can Protect Pending NTSC Applications Within The Confines Of The CBPA

The Commission should construe the phrase "transmitting in analog format" as describing only the nature of the service entitled to protection, i.e., analog, and not the status of the station's existing operation, i.e., pending application, authorized or operating station. By interpreting the CBPA in this manner, the Commission can implement the legislation consistent with its statutory obligations and its longstanding regulatory framework, i.e. maintaining the protection traditionally afforded to full service applicants.

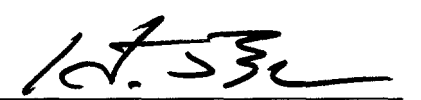
[7] 47 U.S.C. § 336 (f)(7)(B).

III. THE COMMISSION SHOULD PERMIT INTERFERENCE AND SETTLEMENT AGREEMENTS BETWEEN CLASS A STATIONS AND APPLICANTS FOR NEW NTSC STATIONS

In the event the Commission feels statutorily obligated to adopt its proposal to require Class A applicants to protect only authorized NTSC stations and not all pending NTSC proposals, the Commission should permit interference and settlement agreements between Class A and pending NTSC applicants. For example, in certain markets it may be possible to accommodate a pending NTSC applicant by the relocation of a Class A applicant to another channel. The Commission should encourage such agreements, which will clearly maximize efficient use of a scarce spectrum. Likewise, permitting pending NTSC applicants and Class A applicants to negotiate interference agreements will have the same beneficial affect.

Respectfully submitted,

TELEVISION CAPITAL CORPORATION

By: 

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February 10, 2000

CERTIFICATE OF SERVICE

I, Dina Etemadi, a secretary in the law firm of Pepper & Corazzini, LLP, hereby certify that on this 10th day of February, 2000, copies of the foregoing "Comments" were hand delivered to the following:

The Honorable William Kennard
Chairman
Federal Communications Commission
The Portals II, Room 8-B201
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
The Portals II, Room 8-A302
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Susan Ness
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The Honorable Michael Powell
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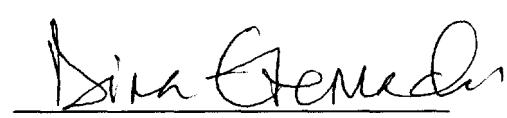

Dina Etemadi